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at 10 a.m.
New York

SUMMARY RECORD OF THE 24th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. CALERO RODRIGUES (Brazil), referring to the draft articles on the non-navigational uses of international watercourses, said that the articles on protection and preservation adopted by the Commission at its forty-second session were dispensable, since all the obligations set out in them were contained by implication in previous articles. Furthermore, it was doubtful that the protection of the marine environment, which was dealt with in other instruments, fell within the scope of the articles under consideration. Legal texts should be limited to the essentials, which should be expressed as clearly as possible. That notwithstanding, Brazil would not oppose the adoption of articles 22 to 25.

2. "Emergency situations" (art. 27) occurred suddenly and caused, or posed an imminent threat of causing, serious harm to other States. However, "Harmful conditions" (art. 26), although not arising as abruptly, could also be harmful to other States. Neither article expressly linked the situations or conditions in question to watercourses, but such a link could be inferred from the examples of causes given in the two articles; moreover, there would be no justification for including in a set of articles on watercourses provisions on phenomena not linked to watercourses. However, Brazil would like the articles to be drafted with more precision.

3. Brazil was satisfied with the drafting of the provisions on the obligations of States in the case of harmful conditions or emergency situations. In the case of harmful conditions, there was only an obligation to take all appropriate measures to prevent or mitigate them. In the case of emergency situations, there was in addition an obligation immediately to inform potentially affected States and competent international organizations. Reference was also made to the possibility of an obligation to develop joint plans for responding to emergencies, where appropriate. Such an obligation depended on whether States agreed on the need to develop such plans, but the text of article 27 was not explicit on that question.

4. Brazil hoped that the articles referred by the Commission to the Drafting Committee could be drafted in such a way as to avoid too many divisions. For example, it saw no reason why the articles on the regulation and management of international watercourses should be separate, since regulation was just one aspect of management. Nor did it see the difference between the provision stipulating that States should co-operate in identifying needs and opportunities for regulation and the provision stipulating that States should enter into consultations, at the request of any of them, concerning the establishment of joint organizations for management. The provisions in question could even be considered as unnecessary, in the light of article 4, paragraph 3. If the reference to management was

(Mr. Calero Rodrigues, Brazil)

maintained, the concept of management should not be defined in terms of "functions"; it should be defined expressly and should cover regulation.

5. Brazil agreed with the Commission members who felt that if the provisions on the protection of water resources and installations were needed they should refer only to the protection of installations, since the protection of water resources was indistinguishable from the protection of watercourses, which was the object of the draft articles. It was doubtful that the inclusion of a provision on the protection of installations in time of armed conflict was either necessary or appropriate. It would be better to deal with that issue in the context of the rules governing the conduct of States in time of armed conflict. Such rules would apply to watercourses and to watercourse installations without any need for special provisions in the draft articles under consideration.

6. Brazil endorsed the concept embodied in article 24, namely, "the absence of priority among navigational and non-navigational uses of watercourses". But paragraph 2 of the article should be redrafted so as to indicate in a more straightforward manner that the relationship between different uses should be determined by the States concerned themselves.

7. With regard to the annex proposed by the Special Rapporteur on the implementation of the draft articles, Brazil was not at all sure that it had a proper place in a framework convention. In most instances the instrument under preparation would be implemented through separate agreements tailored to the needs of specific watercourses, and it would be implemented directly only residually. Most of the proposed provisions seemed unnecessary, and rather cumbersome machinery was not needed in order to review implementation and to consider amendments. Amendments did not call for a special provision when the matter could be dealt with under the Convention on the Law of Treaties. Where other criticisms of the annex were concerned, Brazil agreed that it was somewhat lacking in consistency and that the only obligation laid down in articles 2 to 5 that embodied an acceptable principle was the one set out in article 3, which could be included in the section on general principles. Brazil also agreed that article 7 was unhelpful, and that it was doubtful that the provision laid down in article 8 would be an improvement on the general procedure concerning amendments laid down in the Vienna Convention.

8. In connection with the comment that the annex raised a problem of far-reaching implications, the problem of civil liability, Brazil believed that no provisions concerning the legal consequences of harm were needed in the articles under consideration. However, if any such provisions were included, it would suffice to include a single provision stating the principles of non-discrimination and equal right of access, as laid down in article 3, paragraph 1, and in article 4. In referring the two provisions to the Drafting Committee, the Commission had thus chosen the proper way of dealing with the problem of civil liability.

9. Where the other provisions suggested in the annex were concerned, the Special Rapporteur had himself acknowledged that the time had not yet come for action on the text and had recommended that only two provisions should be referred to the

READEX FICHE

(Mr. Calero Rodrigues, Brazil)

Drafting Committee, reserving the possibility of submitting new proposals at the following session. In that connection, Brazil urged the Special Rapporteur not to insist on submitting the proposals set out in the annex once again, which would only hinder progress on consideration of the topic.

10. Mr. MOMTAZ (Islamic Republic of Iran), referring to the draft articles on the non-navigational uses of international watercourses, said that articles 25 and 26 actually dealt with the same subject, namely, the joint exploitation of watercourses by riparian States. In that connection, he wished to stress the general obligation to co-operate laid down in article 9. He noted that article 25 did not define the term "regulation". The definition adopted by the International Law Association in 1980 was satisfactory, in his view. Once again in connection with article 25, he wished to draw the Committee's attention to the negative impact that regulation of a watercourse could have on the territory of States situated downstream. Article 25 should deal with such a situation, since in many cases the construction of regulation works upstream had been a source of conflict between States. Naturally, such a provision would have to reconcile the traditional concept of the use of international watercourses, based on the assumption that the principle of State sovereignty should prevail, with the current evolution in the rights and obligations of States in exercising their territorial competence. Unquestionably, neighbouring States had to meet requirements that limited the freedom of action that States normally had in governing their territories.

11. The fundamental principle to bear in mind was that all riparian States could undertake the construction of works on an international watercourse, provided that such construction did not cause appreciable harm outside their territory. The purpose of that principle was to guarantee equitable and rational use of the water, and was in keeping with the obligation of watercourse States not to cause appreciable harm, as indicated in draft article 8. That was a principle of customary law solemnly reaffirmed in Principle 21 of the 1972 Stockholm Declaration on the Human Environment. All States thus had the sovereign right to exploit their resources pursuant to their own environmental policies, provided that they ensured that activities within their jurisdiction did not cause serious harm to the environment of other States. It would be wrong to conclude that that principle entitled a State to pronounce on the economic policy of another State and to obstruct its economic development plans.

12. With regard to article 26, in his country's view, the term "management" included the functions listed in paragraph 2, but also, first and foremost, the regulation of watercourses. For that reason, that function should occupy a prominent place among the duties of the organizations responsible for managing an international watercourse. Although organizations of that type catered to a practical need, his delegation did not share the view that their establishment should be obligatory. In that connection, it was necessary to avoid the errors which might arise from the current wording, which need not be interpreted as implying that the obligation to enter into consultations involved the obligation to achieve some result. Nor did his delegation take the view that those organizations must of necessity include all the watercourse States, since a number of river

(Mr. Momtaz, Iran)

commissions currently functioned effectively without numbering all the riparian States among their members.

13. His delegation supported unreservedly the view that article 28 should prohibit not only the contamination of watercourses, but also any activity designed to cut off an enemy's water supply. The result would be that not only contamination, but also drying up and diverting watercourses would be prohibited. All those activities were both war crimes and crimes against humanity. The provisions were designed to protect the civilian population against the harm occasioned by armed conflicts, and were concordant with Additional Protocol I to the 1949 Geneva Conventions, and in particular with the provisions therein regarding protection of objects indispensable to the survival of the civilian population, such as drinking-water supplies and irrigation works. The concept of inviolability of watercourses and their associated installations reflected humanitarian considerations. The question was whether that immunity should be waived when those objects served directly to support a military operation. His Government advocated the absolute immunity of watercourses, in view of the extreme difficulty of distinguishing between civilian and military use. That was still truer of dikes and dams; even when they served to support military operations, they must be protected as structures and installations whose purpose was to contain dangerous forces, in view of the pernicious effects of their destruction on the civilian population.

14. With regard to annex I, his delegation strongly favoured the idea of enabling private enterprises to obtain compensation for any harm that had been suffered, without involving the watercourse States in the dispute. It seemed sensible to ensure access by those enterprises to the courts of all the watercourse States, thereby avoiding the necessity for small enterprises to have recourse to diplomatic procedures. Nevertheless, it should be borne in mind that in some cases that solution would involve a reform of the judicial systems, which would not be readily acceptable. His delegation wished to put on record its serious reservations as to whether the ordinary courts were in a position to apply international law on liability in settling such disputes. Consequently, it would be desirable to continue to study the potential effects of application of such a criterion on the functioning of States' jurisdictional systems, particularly where States did not have a sufficient number of suitable officials. In order to avoid those difficulties, his delegation suggested that the articles in question should be included in an optional protocol to the future framework convention on the law of the non-navigational uses of international watercourses.

15. Mr. YEPEZ (Venezuela) began by stressing the substantial progress achieved on the topic "Draft Code of Crimes against the Peace and Security of Mankind" and the work accomplished by the Working Group that had studied the question of the establishment of an international criminal jurisdiction.

16. Turning to the topic "Jurisdictional immunities of States and their property", he said that it had been a logical decision to postpone the final adoption of the articles revised by the Drafting Committee until the Commission had completed its

(Mr. Yepez, Venezuela)

second reading and consideration of the remaining articles at its forty-third session. With regard to the title of part III of the draft articles, his delegation would have preferred the term "Exceptions to State immunity", but it did not oppose some other formulation such as "Cases in which the immunity of one State cannot be invoked before the courts of another State".

17. Draft article 12, on contracts of employment, must be retained, as safeguarding the possibility for employees of a foreign State to have recourse to the national courts in the defence of their rights. The wording of paragraph 1 of that article was confused, and his delegation supported the proposal to delete the reference to "social security". The exceptions provided under paragraph 2 should also be limited, by deleting subparagraphs (a) and (b).

18. Article 13, which set out to regulate the extracontractual liability of the State in respect of non-commercial acts, should be deleted, basically because exceptions to State immunity must be reduced to a minimum. Alternatively, the provision should be clarified and made more specific, particularly with regard to the phrase "the act or omission which is alleged to be attributable to the State", and with regard to the connection between the author of the act or omission and the defendant State.

19. With regard to article 14, dealing with ownership, possession and use of property, his delegation favoured the deletion of subparagraphs (c), (d) and (e) of paragraph 1, the introduction into subparagraph (b) of the concept of property situated in the forum State, and the deletion of paragraph 2.

20. Article 15, on patents, trade marks and intellectual or industrial property, could be deleted, since its provisions were subsumed in other provisions of the draft articles, or because it could be covered in the international legislation regulating the question.

21. His delegation supported the deletion of article 16, on fiscal matters, having regard to the criterion that exceptions to State immunity must be reduced to the indispensable and relevant minimum.

22. With regard to article 19, "Effect of an arbitration agreement", it would be preferable not to include subparagraph (d) on the recognition of the award; it would be useful for the provision to specify that the act of concluding the arbitration agreement to which the article referred did not imply subjection to the jurisdiction of the forum State, so as to avoid confusing the arbitration agreement with the waiver of immunity.

23. On the understanding that the measures of nationalization were sovereign acts of the State, his delegation agreed with the majority of members of the Commission that article 20 should be deleted.

24. One question of particular importance was that concerning State immunities in respect of property from measures of constraint, to be regulated in part IV by

(Mr. Yepez, Venezuela)

articles 21, 22 and 23. His delegation considered that the draft articles must come closer to a broad and non-restrictive concept of immunity from execution or from measures of constraint on the property of a State. The draft articles must clearly set forth the principle of non-execution on the property of a foreign State in the territory of the forum State. It would be possible to work on the text of articles 21 and 22 of the second alternative submitted by the Special Rapporteur, with the proviso that the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in paragraph 1 (c) of article 21, must be retained, and that, in paragraph 1 (c) of article 22, the words "and used for monetary purposes" must not be included. The wording of paragraph 2 of the new article 22 should reflect the idea that the property referred to in paragraph 1 of that article would be protected against any form of measures of constraint. In principle, the new article 23 was unnecessary.

25. Turning to the topic of the law of the non-navigational uses of international watercourses, he said that article 24 required clarification. The parties to the "agreement to the contrary" referred to in paragraph 1 should be specified. Various factors must be taken into account in that article, including the need to secure or maintain a high level of water quality for the health of the population, and domestic and agricultural uses, as well as the use of water with adverse effects on the environment. It was also important to clarify and develop the provisions of article 25. In paragraph 1, the obligation for international watercourse States to co-operate when one of them so requested, with a view to regulating international watercourses, should be directly established, and the purpose of such regulation specified. Paragraph 2 might stipulate only the obligation for the watercourse States to reach an agreement on the construction and maintenance of works relating to the watercourse.

26. With regard to article 26, the obligation outlined in paragraph 1 should be extended to include not only "consultations" but also "negotiations" and "institutionalization" of the appropriate management mechanism. The term "organization" might be replaced by "commission" or another more appropriate term. Similarly, the functions outlined in paragraph 2 might be spelled out even more clearly. Subparagraph (b) of paragraph 2 might state what type of information and data should be exchanged among States; subparagraph (d) should be clarified, particularly the term "multi-purpose"; the reference in subparagraph (e) to "proposing ... decisions of the watercourse States" should be clarified; subparagraph (f) could envisage clean-up and environmental protection measures and human health.

27. In article 27, paragraph 1, the words "shall employ their best efforts" could be replaced by some more specific wording; paragraph 2 might also provide for the obligation to negotiate "agreements" or "arrangements"; the reference to "international watercourses" in paragraph 2 (b), could be deleted. Article 28 could be divided into two parts, one dealing with peaceful uses, the other dealing with armed conflict. However, the word "inviolable" should be replaced by a more appropriate word.

(Mr. Yepez, Venezuela)

28. Annex I entitled "Implementation of the draft articles" required further study and thought. In light of the proposal contained in paragraph 313 of the Commission's report, the annex should be substantially amended. Since the question dealt with in article 6 was being dealt with in another draft the article should be deleted. Articles 7 and 8 could be moved to the part dealing with final provisions. Moreover, the annex could be part of an optional document on the civil liability régime in order to make redress for injury available to individuals.

29. His delegation was greatly pleased by the Commission's provisional adoption of the text of articles 22 to 27 which comprised parts IV and V of the draft articles and which referred to protection and preservation and to harmful conditions and emergency situations.

30. Mr. HANAFI (Egypt) said that his country had always attached particular importance to the law of the non-navigational uses of international watercourses, since that affected good-neighbourly relations between the States in the Nile basin. For that reason, the efforts being made to ensure that the first reading of the draft articles on the topic was completed during the current term of office of members of the Commission were laudable.

31. Although the text of draft article 24 was balanced, paragraph 2 should make reference to the obligation not to cause appreciable harm which was the subject of article 8 of the draft articles.

32. The term "regulation" in the title of draft article 25 did not reflect either the essence or the purpose of the article. At first glance it would seem that the article really set forth principles which were regulated in other provisions of the draft articles. However, no final judgement could be made on the article until the Commission defined the term "regulation".

33. In the view of his delegation draft article 26 was of vital importance since it contemplated the possibility that watercourse States might establish a joint organization for the management of a watercourse. That provision was indispensable in order to protect international watercourses and to ensure that they were put to the best possible use.

34. He agreed with the general thrust of draft article 27, which focused on the protection of water resources and installations.

35. It would be a good idea, when preparing a new version of draft article 28, to refer to the rules of international law applicable in cases of armed conflict, since by doing so any possible omissions would be filled.

36. With respect to the text of annex I proposed by the Special Rapporteur and contained in chapter IV of the Commission's report, he pointed out that the title did not clearly reflect the content of the annex. Furthermore, a detailed analysis should be made of the relationship between claims for compensation made by individuals and those made by States. Furthermore, it would be well to delete or

(Mr. Hanafi, Egypt)

amend article 3, paragraph 2, of the annex, since it contained a clause which had nothing to do with the draft articles, namely, the invitation to States to co-operate in the development of international law relating to responsibility and liability. Likewise, articles 7 and 8 of the annex served no real purpose within the draft articles.

37. As some delegations had pointed out, each watercourse was a world unto itself and had its own characteristics. Adoption of the draft articles would make it possible for countries which belonged to each of those worlds to apply directly in their own territory a set of rules which were in the nature of a framework instrument.

38. Mr. YAMADA (Japan), referring to the programme of work outlined in paragraph 538 of the Commission's report (A/45/10), said that the Commission should make every effort to conclude the second reading of the draft articles on jurisdictional immunities of States and their property during the current term of office of its members. In that connection substantial progress had been made thanks to the efforts of the Special Rapporteur.

39. With regard to chapter III of the report, he was pleased to learn that draft articles 12 to 28 had been referred to the Drafting Committee and that the latter had reached agreement to provisionally adopt draft articles 1 to 16, with the exception of paragraph 1 (b) (iii) bis of articles 2 and 11.

40. The international community did not have a unified position regarding State immunity. While some States were in favour of absolute immunity, others were inclined to favour limited immunity. Under the circumstances, it would be wise to establish rules concerning the extent to which State immunity could or should be limited. According to the text of the draft articles prepared by the Commission, there were two types of provisions. The first type, which would include those in parts I and II, established that States could, in principle, enjoy immunities with certain limitations. The second type elaborated the scope and extent of the limits on State immunities. He commended the Commission for its efforts to seek a consensus regarding what types of State activity should enjoy immunity. The Commission was acting in a realistic manner, without going too deeply into theoretical matters concerning general principles of the jurisdictional immunities of States. He hoped that an equally realistic approach would be adopted in efforts to complete the second reading of the draft articles.

41. He recalled the proposal by the Special Rapporteur concerning paragraph 3 of the newly combined article 2, which stated that one of the criteria for determining immunity should be whether or not a given operation corresponded to "commercial transaction". The purpose of that proposal was to win broad acceptance, taking into account the fact that some States attached importance to government purpose while others supported the primacy of the nature of a transaction as the test for determining whether or not a transaction was commercial.

(Mr. Yamada, Japan)

42. The expression "the relevant rules of general international law" in article 5 (original art. 6) should be deleted since, otherwise, the scope of the immunity would be unclear. However, taking into account the fact that article 5 was related to the other articles, it might be better to wait until consideration of the remaining articles had been completed before considering whether or not the bracketed phrase should be retained.

43. His delegation was pleased to see that article 11 (bis) was more acceptable as currently reformulated. In that respect he praised the efforts made by the Special Rapporteur to clarify those cases in which a State enterprise was considered independent of the State and subject to the same rules with regard to responsibility as natural or juridicial persons.

44. With regard to State immunity from measures of constraint (arts. 21 and 22), in view of the difference of opinion surrounding that issue, the Commission should consider the issue in depth with a view to achieving a proper balance of the various criteria applicable to each article.

45. With regard to chapter IV of the Commission's report on the law of the non-navigational uses of international watercourses, his delegation noted that the fifth and sixth reports of the Special Rapporteur had given rise to useful discussions. The second part of the fifth report (A/CN.221/Add.2) included articles 24 and 25, and the first part of the sixth report (A/CN.4/427 and Corr.1 and Add.1) contained three new articles 26 to 28 and a new annex I. It was gratifying to note that the Commission had concluded its consideration of articles 24 to 28, together with article 3, paragraph 1, and article 4 of annex I, and had then referred them to the Drafting Committee. It also noted that, after examining the report of the Drafting Committee, the Commission had adopted draft articles 22 to 27 provisionally. The purpose of the work on that topic was to draw up a basic framework convention, an approach towards completion of the first reading during the current terms of office of its members.

46. Turning to article 25, he welcomed the Special Rapporteur's efforts to reach a balanced solution to the complex question of uses of international watercourses. While recognizing in general the necessity to regulate international watercourses, Japan expected the Commission to undertake exhaustive discussions so as to clarify the content of the legal obligations of each State, the modalities of participation of each State in those regulations, and of the burden-sharing that accompanied regulation.

47. Japan agreed with the idea of joint management of international watercourses as one of the important modalities of international co-operation, for which the Commission must consider the issue further. Given the framework nature of the Convention, draft articles should be described in general terms and the specific contents and management functions of such organizations should be dealt with in future bilateral or regional watercourse agreements.

(Mr. Yamada, Japan)

48. It was necessary for the Commission to undertake a further examination of the contents of the obligations of each State in respect of the draft articles, proposed in annex I, for relief to individuals who suffered damage. Only after such an examination should the Commission start to consider the articles in specific terms, i.e. whether they should be incorporated into the body of the draft articles or attached thereto as an optional protocol.

49. Mr. CRAWFORD (Australia) said that, despite the remark made in paragraph 243 of the Commission's report, he had some brief comments to make on the issues, as yet unresolved by the Commission, concerning the jurisdictional immunities of States and their property. Those issues were of importance if the draft articles, and any convention that might emerge therefrom, were to achieve a broad measure of acceptance, especially by those States in whose courts issues of immunity most often arose.

50. The first issue was whether special provision should be made for State enterprises with segregated State property. Many States conducted aspects of their affairs through separate corporations established under their own law and having title to their own property. The courts of other States would normally recognize the separate status and property of such entities and, in most circumstances, questions of the liability of the State itself for acts of a separate entity would normally not arise. Those were not issues of jurisdictional immunity strictly so-called but issues of substantive liability. Such issues were not regulated by the current draft articles, although it might be desirable to add a savings clause to make clear that the draft articles were without prejudice to the attribution of any liability to a given legal entity under the law governing the status and transactions of that entity. Australia favoured recognition of the institution of State enterprises with segregated State property. Such a change to the draft articles might well enable some States to accept other proposed provisions, especially those concerning execution against property set aside for use by State enterprises.

51. Referring in particular to the terms of draft articles 12 to 28, as proposed by the Special Rapporteur, he pointed out that draft article 13, as worded, accorded with the practice of those States which had taken a public position on the issue of personal injuries and damage to property. The draft article should not be limited to traffic accidents nor to events covered by insurance. To make clear the specific character of that provision, his delegation saw merit in the proposed proviso to the effect that article 13 was without prejudice to any issue of State responsibility. It should likewise be provided that article 13 applied only to injuries or damage done by a person in the territory of the forum State. His delegation could not agree with the objection that it was incongruous for article 13 to provide for the liability of the State itself in cases where a diplomatic representative of the State, whose act caused the injury, would be immune from liability. Diplomatic immunity was quite distinct from State immunity.

(Mr. Crawford, Australia)

52. So far as draft article 14 was concerned, he could not agree that paragraph 1, sub-clauses (c) to (e) could simply be deleted, because the principle underlying that legislation was valid. In none of those cases could the fact that one claimant was a State be allowed to prevent the local courts from deciding on the disputed claims. The draft article should be retained whether or not the aforesaid sub-clauses were retained.

53. Draft article 15 should be extended to cover new categories of intellectual property rights generally recognized, such as rights in computer programs. Draft article 19 should be limited to the specific issue of jurisdiction over the conduct of arbitrations, leaving the recognition and enforcement of arbitral awards to be dealt with by other provisions, especially the provision dealing with commercial contracts and the recognition and enforcement of arbitral awards. Draft article 20 was perhaps not strictly necessary, but it might be better to retain it.

54. On the issue of execution and enforcement of judgements, his delegation supported the view of the majority of the Commission in preferring the second alternative version of articles 21 to 23 proposed by the Special Rapporteur, especially if the words in brackets in draft article 21, paragraph 1 (c), were omitted. It must be stressed that no question arose as to the execution against general State property of judgements obtained against a separate State enterprise with its own legal personality. Accordingly, draft article 23, which dealt with segregated State property, should be retained.

55. Draft article 26 also needed to be considered in the context of enforcement. As it stood, the article was ambiguous: it was not clear whether the immunity was from the making of a court order requiring a State to perform or refrain from performing a specific act, or merely from suffering a monetary penalty for violating such an order. Article 26 should therefore be reformulated in order to make it clearer.

56. With regard to draft article 24, on service of process, the Special Rapporteur apparently proposed to delete paragraph 1 (a), which was not desirable and was inconsistent with the basic principle of consent.

57. With regard to draft article 25, there had been a suggestion to include a requirement that a court should not issue a default judgement without considering ex officio whether the foreign State was immune. That certainly warranted further consideration: there had been cases where default judgements had been issued in circumstances where it seemed reasonably clear that the defendant State could have relied on immunity. Moreover, the rules relating to default judgements were very much part of the internal procedural law of each State. If such a special provision was to be inserted, three limitations should be imposed. First, the provision should extend only to the issue of immunity; secondly, the court should not be required to go beyond the facts as they appeared on the papers before it; and, thirdly, that principle should apply to the question of whether it appeared that the defendant was a foreign State as defined.

58. Mr. KEKOMAKI (Finland), speaking on behalf of the five Nordic States - Denmark, Iceland, Norway, Sweden and Finland - on the issue of the non-navigational uses of international watercourses, referred to draft articles 22 to 27 provisionally adopted by the Commission in 1990. Since the Nordic countries had already commented on the matters in question in their two previous statements, endorsing the Commission's approach in general, the current statement would be restricted to some brief comments.

59. First, articles 22 to 25, which were quite generally formulated, contained broad principles or statements of environmental policy rather than detailed rules. The implementation of the provisions on the prevention, reduction and control of pollution would be determined on the basis of local circumstances. The sort of co-operation established in regard to planned measures (part III of the draft), which consisted in the duties to notify and consult, should be fully applicable to ensure adequate environmental protection. It might be necessary to spell that out more clearly in the draft.

60. The Nordic countries noted that as a result of changes made in articles 26 and 27 in order to clarify the distinction between "normal" hazards and emergency situations - as suggested by many countries, including the Nordic countries themselves - and as a result of the deletion of the reference to equity in article 26, the environmental provisions of the draft were very close to being finalized. Furthermore, the Nordic countries would like to reiterate their view that when the relationship between the different uses was established care should be taken to avoid a mere ad hoc settlement that ignored the interests of future users and those of the community at large.

61. On the subject of annex I, on which Governments' comments had been requested, the Nordic countries endorsed the approach taken by the Special Rapporteur, who believed that watercourse problems should be resolved on the private level, through courts and administrative bodies, in so far as possible (A/CN.4/427, para. 39). The annex was based on a number of general principles, such as use of domestic remedies, non-discrimination and equal access. In drawing up the annex, the Special Rapporteur had used the Nordic Convention of 1974 on the Protection of the Environment as a source of inspiration, and had used the experience gained at the regional level, especially within the framework of the Organisation of Economic Co-operation and Development, in tackling problems relating to transboundary pollution. Several reasons spoke for domestic procedures at the private level: they were usually less costly; they involved the individuals and companies actually engaged in the relevant activities; they provided a more effective incentive to comply with the rules; in certain cases they were faster than diplomatic channels; they led to legally binding and enforceable determinations of the relevant parties' obligations; and they encouraged regional co-operation in the management of the particular watercourse system. Obviously, the weight of such considerations depended on the particular circumstances.

62. The provisions of annex I stressed what was essential for the establishment of a non-discriminatory private-remedies system, and reflected existing texts. The Nordic countries were ready to support the ideas of non-discrimination, equal right

(Mr. Kekomaki, Finland)

of access and information, as expressed in articles 2 to 5. They shared the general opinion that articles 6 to 8 went beyond the scope of a framework agreement. The idea of convening a conference of the parties appeared to be unhelpful with regard to the draft under consideration, and the amendment provision was likewise hardly necessary. As to the place of articles 1 to 5, it was less important whether they were ultimately incorporated into the body of the draft or included in an annex.

63. The proposed institutional arrangements must meet the requirements of efficient management. In some cases the establishment of joint commissions might be too cumbersome, particularly in respect of small boundary rivers. The Nordic countries assumed that in such cases the institutional suggestions would be sufficiently flexible.

The meeting rose at 12.20 p.m.

UNITED NATIONS

General Assembly

FORTY-FIFTH SESSION

Official Records

SIXTH COMMITTEE
25th meeting
held on
Wednesday, 31 October 1990
at 10 a.m.
New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. SUN Lin (China), commenting on the draft articles on jurisdictional immunities of States and their property, said that the definition of the term "State" in article 2 should not include State enterprises and corporations. As independent legal persons, such entities could both institute a proceeding and be sued against and should not therefore, in principle, enjoy jurisdictional immunities, as they did not enjoy immunity even under the domestic law of many States. To confuse those independent legal entities with States and thereby subject them to State immunities amounted in practice to confusing the liabilities of those entities with those of States. It was therefore necessary to draw a clear distinction between "State" and "State enterprise and corporation" with regard to jurisdiction and the limits of liability. Paragraph 2 of draft article 11 should provide that States should not be held responsible for State enterprises and corporations and that no proceeding could be instituted against a State before a court of a foreign State in connection with disputes with those enterprises and corporations.

2. The inclusion of article 12, on contracts of employment, among exceptions to State immunity was not justified, as it did not have sufficient basis in practice. As regarded the guarantee of the interests of the employee, disputes relating to the contract of employment could, as stated in paragraph 175 of the report of the International Law Commission (A/45/10), be settled by mutual agreement or by insurance coverage.

3. It was difficult to accept article 13, "Personal injuries and damage to property". Firstly, according to article 31 of the Vienna Convention on Diplomatic Relations, diplomatic representatives should enjoy immunities from judicial proceedings in tort in the receiving State; it was obviously illogical for the sending State of diplomatic representatives not to be entitled to enjoy those jurisdictional immunities itself. Secondly, the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts. Thirdly, the question of a wrongful act or omission attributable to a State was within the scope of the international responsibility of a State. In his delegation's view, the article should be deleted.

4. With regard to article 14, "Ownership, possession and use of property", subparagraphs (c), (d) and (e) of paragraph 1 should be deleted because those provisions were likely to be interpreted as allowing courts of a State to exercise jurisdiction over a foreign State even in the absence of a link between the property and the foreign State.

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5. Fiscal matters fell under the category of public law and proceedings relating to taxation were normally instituted by competent authorities of the foreign State. It would therefore be inappropriate for article 16 to permit a State to institute a proceeding before a court in its territory against another State.

6. Article 18, which considered State-owned or State-operated ships engaged in commercial service as exceptions to State immunity was in principle acceptable to his delegation. The Special Rapporteur and some developed countries had recommended the deletion of the word "non-governmental" in subparagraphs 1 and 4. However, the word could serve as a supplementary criterion for judging the nature of the use of the ships.

7. Article 19 dealt with the effects of an arbitration agreement. It could be presumed that a State's consent to arbitration implied its consent to the exercise of supervisory jurisdiction over the implementation of the arbitral agreement by a court of the arbitral forum State. But that exception to immunity should be confined to arbitration arising out of commercial contract disputes rather than extended to cover civil or commercial matters in general. Moreover, his delegation was not in favour of adding a new subparagraph concerning the recognition of the arbitral award, because that could be deemed to constitute a first step towards execution of the award, which, however, required the express consent of the State concerned.

8. His delegation supported the the Special Rapporteur's recommendation for the deletion of article 20, as sovereign acts of State should not be subject to the jurisdiction of a court of another State.

9. In principle, his delegation accepted article 15 on "Patents, trademarks and intellectual or industrial property" and article 17 on "Participation in companies or other collective bodies".

10. His delegation agreed to the recommendation mentioned in paragraph 216 of the report that the title of Part IV of the draft articles should be altered to read "Jurisdictional immunities of States in respect of their property".

11. Article 21 should explicitly provide that without the express consent of a State no measure of constraint, including measures of execution, should be taken on the property of a foreign State. It should also be explicitly provided that consent to exercise of jurisdiction pursuant to article 8 must not be construed as implying consent to measures of constraint in accordance with Part IV of the draft articles.

12. Article 22 should be reformulated. The text proposed by a member of the International Law Commission, as reflected in paragraph 582 of document A/44/10, could be made the basis of discussion on second reading. It was of crucial importance that the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" be retained in article 21, paragraph 1 (c), because measures of constraint might

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otherwise be taken against property of a foreign State if it were used for commercial purposes.

13. His delegation accepted the reformulations proposed by the Special Rapporteur relating to paragraphs 1 (a) and (b) of article 24. With regard to article 25, it welcomed the Special Rapporteur's recommendation to add at the end of paragraph 1 a phrase reading "and if the court had jurisdiction in accordance with the present articles".

14. In the efforts to develop a legal régime relating to jurisdictional immunities of States and their property, the principle of State immunity under international customary law should be emphasized and strengthened and, on that basis, and taking into account different social, economic and legal systems of various countries, some provisions developed regarding the exceptions to the principle of State immunity, with a view to striking a necessary balance between efforts to seek fair and reasonable settlement of disputes and the elimination of abuse of domestic juridical procedures of a State against another sovereign State.

15. Turning to the topic on the law of the non-navigational uses of international watercourses, he said that article 24, proposed by the Special Rapporteur, was necessary because article 2, provisionally adopted by the Commission, had recognized the relationship between navigational and non-navigational uses of international watercourses. In view of the development of technology, rapid population growth and the scarcity of water resources, no one use of international watercourses should have priority over other uses. On the other hand, the general rule did not imply the exclusion of the possibility that watercourse States might assign priority to navigation through specific agreements. Paragraphs 1 and 2 of article 24 were therefore appropriate. The proposal by some members to include a reference to the obligation not to cause appreciable harm, set forth in article 8, merited consideration.

16. With regard to article 25, it seemed necessary to define the term "regulation". The approach reflected in paragraph 1, whereby regulation was not regarded as a general obligation for watercourse States but as an obligation of co-operation, was no doubt correct. Watercourse regulation was conducive to optimum utilization and prevention of potential harm. Co-operation should be based on general principles of international law, such as sovereign equality, territorial integrity and mutual benefit, in accordance with the provision laid down in article 9.

17. Some members had expressed doubt about the necessity of article 2. They had a point, since it was inconceivable that a watercourse agreement on regulation works would neglect the provision for a sharing of the burdens. However, should the Commission decide to retain the article, his delegation would have no objection.

18. With regard to article 26, a study of relevant international instruments and State practice revealed that management through joint institutions was a very good form of international co-operation to ensure optimum utilization and protection of

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international watercourses. The obligation to enter into consultation was not entirely the same as the obligation to negotiate, and consultation did not necessarily lead to negotiation. If that understanding was correct, he could, in principle, accept the article, but the word "shall" in paragraph 1 could be changed to "should" or "may", and the phrase "at the request of any of them" could be deleted. A concise definition of the term "management" could be made instead of drawing out an exhaustive list. Watercourse States had the freedom to make decisions on the functions of the joint institutions through their negotiations on specific agreement.

19. Articles 27 and 28 concerned the protection of water resources and installations. Article 27 was necessary. Nevertheless, more studies were needed on the scope of the provision, as well as on the question as to whether the obligation of consultation should be mandatory or optional. In principle, he also agreed to article 28, the provisions of which went beyond the requirements of general international law and the relevant provisions of the two Protocols to the Geneva Conventions of 1949. However, the concepts of "exclusively for peaceful purposes" and "inviolability", viewed as the progressive development of international law, seemed to be acceptable.

20. Annex I, "Implementation of the Draft Articles", needed improvement. The provisions of the annex had introduced certain concepts and rules that were disputable in international law; certain obligations in the annex called for a revision of the domestic legislation of States Parties. His delegation welcomed the Special Rapporteur's suggestion that he was willing to consider that part further and submit new draft articles.

21. His delegation needed to study further the draft articles of Part IV, on protection and preservation of ecosystems, and Part V, on harmful conditions and emergency situations, and would comment on them at an appropriate time.

22. Mr. RANJEVA (Madagascar) said that the fact that there was broad agreement, in principle, on the advisability of establishing a permanent international criminal jurisdiction linked to the United Nations system indicated that there was general agreement on enhancing the effectiveness of international law. Indeed, it was evident that a decisive stage had been reached in the creation of an international society that would truly be under the rule of law. The creation of an international jurisdiction should set in motion a process that would progressively bring about a revolutionary transformation in the very functioning of international law, setting it on a sounder course.

23. With regard to the jurisdictional immunities of States and their property, the Commission had been right in postponing until its next session the endorsement of the articles already adopted by the Drafting Committee, as that would improve the overall balance of the Code that was being prepared.

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24. In cases where jurisdictional immunity ceased to apply, that would not be the result of a sovereign act of the State, but rather and essentially a matter of protecting the legitimate rights of third parties and, specifically, of the nationals of the receiving State. It would therefore be advisable to make a study of the situation referred to in the provisions in order to determine the real nature of the event or act concerned or to establish a mechanism for effectively guaranteeing the rights of third parties.

25. With regard to the title of Part III of the draft, a neutral but sufficiently explicit formulation should be worked out. In that regard, limitations or exceptions would not affect the immunity of the State, but rather the activities referred to in Part III. In that case, there could be no reference to elimination of the immunity of the State.

26. Although the decision taken by the Commission on article 12 seemed to be appropriate, he made two observations on the matter. In the first place, recruitment, termination and the renewal of contracts of employment were discretional acts of the employer State, and hence it would be difficult to bring a case against those acts. Nevertheless, in order to avoid arbitrary acts, it would be desirable to establish at least the obligation to notify the employee of the reasons for his dismissal or non-renewal of his contract. In the second place, an indication should be given as to which rights of the employee must be effectively protected. Finally, the reference in article 12 paragraph 1, to social security provisions should be replaced by a reference to the social laws and provisions regulating employment contracts.

27. With regard to article 13, the concerns expressed by different members of the Commission were justified. Consequently, the article should retain the substantive provisions regulating the jurisdictional immunities of States and the institutional régime of the international liability of the State, on the one hand, and the right of victims to compensation for damage, on the other. His delegation supported the Special Rapporteur's proposal to include a new paragraph which would read "Paragraph 1 does not affect any rules concerning State responsibility under international law". In addition, as a condition for jurisdictional immunity, the article should establish the obligation to take out insurance policies guaranteeing compensation for injury to the person and damage to property. In that way, the victims could bring a case against the insuror, whereby the State would not have to participate in a sometimes cumbersome procedure.

28. Article 18 should include an expression similar to that appearing in Part II, Section 3, of of the United Nations Convention on the Law of the Sea, "government ships operated for non-commercial purposes". In the case of article 18, immunity would have a functional basis, and non-immunity would be imposed by the profit-making nature of a given activity, no distinction being drawn between the persons performing the activity.

29. The title proposed for Part IV of the draft articles in paragraph 216 of the report of the Commission seemed sufficiently broad to include measures of

(Mr. Ranjeva, Madagascar)

constraint and execution. It would also be desirable for instruments of analysis and research to benefit from State immunities, in order to avoid plundering of the scientific assets of third-world countries.

30. Mr. TREVES (Italy), speaking on the jurisdictional immunities of States and their property, said that the prerequisite established in article 12 to preclude immunity, namely, that the employee should be covered by the social security provisions, could raise problems where proceedings were instituted to request the State to include the employee in its social security system. Furthermore, the exception to the rule of non-immunity in article 12, paragraph 2 (b), seemed too sweeping, even though it was taken for granted that the sovereign State must enjoy a good measure of freedom in hiring and firing foreign employees. Thus, the compromise solution proposed in paragraph 182 of the report, which would allow only pecuniary compensation in cases brought against a State concerning recruitment, renewal of employment or reinstatement of an individual, seemed sensible.

31. Although not a common-law country, Italy shared the concern expressed at the proposal to delete article 14, subparagraphs (c), (d) and (e), because they contained legal concepts existing in the common-law countries that could not be deemed to be included in subparagraphs (a) and (b).

32. With regard to article 18, his delegation did not agree with the proposal to specify only "ships engaged in commercial service", and preferred the expression "ships engaged in commercial or non-governmental service".

33. The codification of the law of jurisdictional immunities of States included a few general rules on which all States were in agreement and focused on immunity for governmental activities, but differences emerged with regard to the expression "progressive development" which, for some States, entailed the adoption of provisions limiting State immunity as much as possible, while for others it was an incentive to broaden immunity. Consequently, and bearing in mind the absence of unanimity, the expression "progressive development" could only mean that it was necessary to make the law more uniform. Consequently, the aim was to reach a compromise, and the final text being drafted must be more flexible and must reflect some elements of the differing positions of States. The text would thus retain divergences, which should be kept to a minimum, of which account would need to be taken so as to develop provisions for regulating their consequences, namely, rules concerning reciprocity.

34. Turning to annex I of the draft articles on the law of the non-navigational uses of international watercourses, he reiterated his delegation's view that reparation could be invoked only where the mechanisms and procedures provided for avoiding or minimizing damage as well as for repairing it under private law had produced no results. That philosophy seemed to have been adopted also by the Special Rapporteur.

35. His delegation endorsed the general thrust of the articles proposed for annex I, but wished to make two comments: first, in view of their importance, those articles should be included in the main body of the draft convention;

(Mr. Treves, Italy)

secondly, draft articles 7 and 8 of annex I belonged with the final clauses; it was thus odd for them to appear under the heading "Implementation of the draft articles".

36. Article 24 established an important presumption, namely, that no use should enjoy priority over other uses. That provision was consistent with the idea that priority for navigation could no longer be defended, even though re-established by specific agreement in particular circumstances.

37. As stipulated in article 28, international watercourses should be used only for peaceful purposes and should be "inviolable" in times of international and internal armed conflict. Nevertheless, the Drafting Committee should replace the term "inviolable" by another, less problematical term.

38. Parts IV and V of the draft articles made an important contribution to the consolidation of general principles on international environmental law. The fact that those articles were based on Part XII of the United Nations Convention on the Law of the Sea showed that there was a trend towards regarding them as an integral part of customary law on protection of the environment.

39. Mr. PUISSOCHET (France), referring to the jurisdictional immunities of States and their property, noted with satisfaction that the majority of members of the Commission had considered that it was not necessary to take account of a single legal system. Nevertheless, it was disappointing that the Commission had not taken account of the comment of France that it would be preferable not to take up the question of measures of constraint for the time being. It should be noted that the scope of immunity from execution differed from that of immunity from jurisdiction. As could be seen from paragraph 217 of the report of the Commission, the Special Rapporteur himself had pointed out that, owing to the independent development of the issue of immunity from measures of constraint and that of immunity from jurisdiction, there was still a division of opinion on the first-mentioned subject. Consequently, there was a risk that the Commission might be unable to propose widely acceptable solutions unless it changed its view. A possible solution might be to make Part IV of the draft articles optional.

40. He did not share the pessimism of one member of the Commission, whose view was reflected in paragraph 171 of the report, for he was convinced that, if formulas based on doctrine were avoided as far as possible, it would be possible to find generally acceptable practical solutions.

41. With regard to article 1 in the text recommended by the Special Rapporteur (A/CN.4/431), his delegation did not agree with including immunity from measures of constraint in the definition of the scope of the draft articles. Nor did the reference to immunity from jurisdiction of the legislative or institutional organs of another State, proposed by one member of the Commission, seem appropriate.

42. The combined text of articles 2 and 3 recommended by the Special Rapporteur raised problems of two kinds. Firstly, with respect to the definition of "State", subparagraphs (b) and (i) bis and (b) (ii) of paragraph 1 would constitute an

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extension of State immunity under French law. In principle, French courts regarded the territorial subdivisions of a foreign State as subject to their jurisdiction. He therefore reserved his position on that point. On the other hand, he had no objections to subparagraph (b) (iii) because under French law the bodies referred to in that provision could enjoy immunity subject to certain conditions. Secondly, the Special Rapporteur had substituted the concept of "commercial contract" for that of "commercial transaction". Although he understood the reasons for that substitution, he wondered whether the term "opération" was not the most appropriate in French. Thirdly, paragraph 3 of the article provided that in determining whether a contract was commercial, reference should be made primarily to the nature of the transaction, but the courts of the forum State were not precluded from taking into account their governmental purpose. His delegation found the formulation hard to accept because it created great legal uncertainty.

43. With respect to article 12, his delegation considered a restriction of the principle of immunity from jurisdiction in the case of labour disputes legitimate. Nevertheless, it was necessary to strike a balance between two equally valid concerns: that of protecting the interests of employees of a foreign State and respect for the social legislation of the forum State on one hand, and that of avoiding abusive intervention into activities connected with the exercise of governmental authority by the foreign State on the other. With regard to the proposed text, his delegation considered that although the reference to the criterion of coverage by social security appearing in paragraph 1 was inadequate, it could not simply be deleted. For that reason, it would be advisable for the International Law Commission to consider the possibility of taking into account not coverage by social security but the absence from the contract of exorbitant provisions of domestic common law.

44. With respect to the exceptions provided for in paragraph 2, although the new version of subparagraph (a) prepared by the Special Rapporteur was helpful, it seemed too restrictive. His delegation would prefer to retain the more general formulation approved at the first reading. The retention of the subparagraph (b), on the other hand, was essential. It did not seem normal for a court to be able to impose on a foreign State the reinstatement to a mission of a person who no longer enjoyed its confidence. It had been maintained that that possibility could be ruled out in view of article 26 concerning immunity from coercive measures, but it was doubtful that the article referred to would have the effect suggested. The Rapporteur's proposal that a proceeding should be allowable only to the extent that the purpose of the action was pecuniary compensation, unless the court was authorized to issue an order against the foreign State, seemed attractive but might raise difficulties.

45. With respect to article 15, he shared the view of those members of the International Law Commission who had expressed reservations concerning the special references to plant breeders' rights or rights in computer-generated works. As no enumeration could be exhaustive, his delegation considered it preferable to make use of formulations which would cover the various possibilities.

46. In connection with article 18, his delegation noted that the objections it had

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expressed since 1985 concerning the wording of that article had apparently not caught the attention of the International Law Commission. In its view, it was important that the text being prepared should be legally compatible with the various instruments on which it was based. A clear rule emerged from the Geneva Convention on the international régime of maritime ports, the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and the United Nations Convention on the Law of the Sea: in order to enjoy immunity, a ship must be State-owned or State-operated and at the same time in use for non-commercial governmental purposes. His delegation considered that the present text of article 18 departed from the definition derived from those rules of maritime law in two respects, as it: (a) would allow immunity from jurisdiction for a State-owned ship in use for a non-commercial private purpose; and (b) would allow for abandonment of the criterion of actual use of the ship as a means for determining its status. The words "intended exclusively for use" would allow a ship to enjoy such immunity on the basis not of its actual but merely of its potential use. That might give rise to many controversies between States. For that reason, his delegation would renew its request that the International Law Commission refer to the definition appearing in article 6 of the Montego Bay Convention.

47. He accepted the Special Rapporteur's proposal for the deletion of article 20. With respect to Part IV, which dealt with measures of constraint, his delegation's position was well known and he would therefore simply refer to the written comments submitted by his country.

48. With respect to Part V, he wondered if all its provisions actually related to the general theme of the jurisdictional immunity of States. Article 24 moved directly from a definition of the principles applicable with respect to State immunity to a detailed description of the procedure to be followed in bringing an action against a foreign State. The deletion of that article would have no prejudicial implications; the retention of the provision, on the other hand, would give rise to possibly difficult technical discussions. That observation also applied, mutatis mutandis, to articles 25 and 27. His delegation had no substantive objections to article 26.

49. Summing up, he said that although the draft articles in their present form were not completely acceptable to his delegation, he looked forward with interest to the complete series of articles that would emerge from the second reading by the International Law Commission.

50. Turning to the law of the non-navigational uses of international watercourses, he recalled that he had stated his opinion on article 24 at the past session. His delegation could accept the principle of not giving priority to any use stated in paragraph 1, but was not sure that the provision established a conventional rule which could only be abrogated by a contrary conventional rule. With respect to paragraph 2, and to the extent that reference was made in it to articles 6 and 7, he recalled his delegation's reservations concerning the creation in the abstract of a legal obligation to co-operate. Although it was advisable to promote co-operation, only the States concerned could transform it into an obligation. His

(Mr. Puissochet, France)

delegation would prefer that the International Law Commission reconsider the draft as a whole from that point of view.

51. Paragraph 1 of article 25 did not stipulate an obligation to co-operate with respect to the regulation of international watercourses but only in identifying needs and opportunities for regulating them. He shared the opinion referred to in paragraph 270 of the report that the provisions should be formulated in less mandatory terms. With respect to paragraph 2, his delegation had already indicated that, in its view, the principle of equitable State participation could not be established as a general rule. Paragraph 2 should rather be formulated as a recommendation directed towards States in negotiating their individual agreements and not as an additional rule.

52. Article 26 gave rise to some concern. If it was included in the draft text, the Commission would be deliberately exceeding the scope of the framework agreement that it had intended to draw up. It would also be exceeding, no less deliberately, the scope of applicable international law. France, of course, could not but favour the conclusion of agreements similar to those envisaged by the Commission, as was demonstrated by the conventions to which his country was a party. Nevertheless, it could not accept the obligation to enter into consultations on the basis of a unilateral request. Aware of the fact that the work of the Commission included not only the codification of law, but also its progressive development, the French delegation shared, in the case under consideration, the views of the members of the Commission reflected in paragraph 278 of its report. The best approach would be to draw up recommendations which would help States determine for themselves the functions of the body which they might decide to establish. In any case, if the provision was retained, it would be necessary to define the nature of the joint organization. His delegation also had doubts as to the precise scope of paragraph 2 (a).

53. Referring to article 27, paragraph 1, he said that he was surprised by the content of paragraphs 293 and 294 of the report and wondered whether that provision did not repeat other draft articles that had already been adopted by the Commission. Furthermore, he shared the view that, since the title referred to water resources, the scope of the provision was considerably broadened. With regard to paragraph 2, he reiterated his reservations concerning the obligation to enter into consultations. Lastly, he expressed his greatest misgivings with regard to the appropriateness of draft article 28, which considered problems relating to armed conflicts. Its adoption would entail the danger of interference with legal provisions governing armed conflicts and even with other studies by the Commission itself, such as the draft code of crimes against the peace and security of mankind. That article should be reformulated since the notion of the inviolability of international watercourses was surprising a priori.

54. Lastly, recalling the request made by the Commission in paragraph 313 of its report, he said that his Government would, at an appropriate time, submit in written form its views on the draft articles contained in annex I.

55. Mr. GODET (Observer for Switzerland), referring to the law of non-navigational uses of international watercourses, said that the Commission, in drawing up the draft articles, had not intended to transpose the limits of a framework agreement. That expression denoted an instrument that contained general residual norms to serve as a source of inspiration for riparian States. Those States would have the freedom to derogate from such norms on the basis of specific agreements. Under those circumstances, and since the Commission wished to learn the views of Governments on that question, his delegation wondered whether it was really appropriate to include in a framework agreement an annex designed to facilitate the application of the draft articles. That might involve a contradiction. Of course, the annex introduced plausible concepts, such as non-discrimination and equal right of access to the procedures. Nevertheless, it would be preferable to include those articles in the body of the draft text. Although the idea of facilitating procedures and promoting the functioning of civil liabilities systems in order to provide due compensation to victims was correct, his delegation felt that, in regulating such complex problems, the possibilities for adopting the instrument were diminished. An option protocol might be a solution, as had been suggested in the Commission.

56. With regard to article 22, the obligation imposed on States concerning the protection and preservation of ecosystems was perfectly in keeping with practice. That obligation was not self-contained but should be viewed within the context of article 6, namely, the framework of equitable and reasonable utilization and participation. That was tantamount to saying that article 22 did not guarantee absolute protection since the requirements of interdependence and good neighbourliness necessitated a certain tolerance of pollution. Article 23, which set the threshold for observing the obligation to prevent, reduce and control pollution at the level of appreciable harm, seemed to confirm that interpretation of article 22. Since certain watercourses were already polluted, States were expected to do what they could to reduce pollution to mutually acceptable levels. That was the thrust of the two 1976 conventions on protection of the Rhine from chemical pollution and chloride pollution respectively.

57. The concept of the environment referred to in article 23 was broader than the concept of the ecosystem in article 22 so that using both concepts, in spite of their similarity, gave rise to difficulties in interpretation.

58. His delegation supported the idea in article 25 that watercourse States should take measures to protect and preserve the marine environment. Nevertheless, the inclusion of that provision did not mean that all States could intervene in activities aimed at protecting the environment since watercourse States did not have a responsibility "erga omnes", but only to the other watercourse States or riparian States directly affected.

59. Referring to article 26, which had been provisionally adopted, he pointed out that the obligation to take appropriate measures to prevent or mitigate harmful conditions was equivalent to an obligation to act with diligence and that the measures should be adapted to the case in question and take account of both the situation of the State concerned and the harmful situations themselves.

(Mr. Godet, Observer, Switzerland)

60. With regard to article 27, he wondered whether it was realistic to require watercourse States to develop contingency plans for responding to emergencies in co-operation with other potentially affected States and competent international organizations. That would unduly increase the number of those called upon to participate in the application of alarm or information systems; the obligation to reach agreement should only relate to States that were at risk because of an emergency.

61. Article 26 of the text proposed by the Special Rapporteur, which was one of the key provisions of the draft articles, should be considered more thoroughly, even though it had not yet been adopted provisionally. The establishment of joint organizations for management created certain problems. Without prejudice to the general obligation to co-operate, it should be asked whether a framework agreement should define the institutional form that co-operation between the watercourse States should take and whether those States themselves should not agree on that form. Similarly, the obligation to initiate negotiations should not depend on a mere request by one of the watercourse States. In that regard, Switzerland favoured adding an element of objective evaluation, such as had been proposed by some members of the Commission.

62. With respect to the settlement of disputes, his country shared the view of the Special Rapporteur that it was advisable to attempt resolution of any differences at the technical level before proceeding to invoke more formal procedures (document A/CN.4/427/Add.1). Nevertheless, he did not feel that inquiry should involve a separate mechanism because that procedure could be utilized even before a dispute arose. In actual fact, a request to initiate an inquiry involved a use of the watercourse by one of the riparian States which encountered opposition or at least caused certain fears. It was difficult to envisage a fact-finding procedure which was not preceded by a stage of direct consultations between the States concerned and that seemed to be the understanding of the Special Rapporteur when he proposed that the watercourse States concerned might establish a commission of inquiry. For that reason, the Commission should include the inquiry mechanisms among the other settlement procedures.

63. Switzerland agreed that a time limit should be placed on the negotiations, however much the idea of a uniform time limit was open to criticism. The lack of a time limit would enable a reluctant party to oppose indefinitely the application of the conciliation procedure. Otherwise, the parties were free to shorten or extend the negotiation period. His country had no objection to obligatory arbitration or, in other words, resorting to it on the initiative of one of the parties when conciliation failed.

64. Lastly, he felt that in general the draft text was a good starting point. Nevertheless, his country was concerned at the dependent situation of a State which planned a new use of a watercourse in relation to the State that might possibly be affected. There was no doubt that the draft text favoured the State situated downstream since, by claiming that a new use might prejudice its own use, that State received a sort of right of veto over the activities of the State situated upstream. For that reason, a certain balance should be introduced.

The meeting rose at 12.20 p.m.